SUPREME COURT, U.S.

No. 509

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MALCOLM B. DEVERS,
Petitioner

vs.

CAPITAL INVESTORS CO., MARIAN A. MORRISON,
ARTHUR R. MORRISON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Malcolm B. Devers, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on May 2, 1966.

CITATIONS AS TO OPINIONS BELOW

The petitioner, Malcolm B. Devers, seeks review of the judgment contained in the opinion of the United States Court of Appeals for the Fourth Circuit (App. A *infra*) not yet reported, which affirmed the judgment of the United States District Court for the Eastern District of Virginia, at Alexandria, Virginia, (App. B *infra*), which is not reported.

JURISDICTION

Judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 2, 1966. On August 1, 1966, by order of Mr. Justice Brennan, the time within which to file a petition for a writ of certiorari was extended to August 31, 1966. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the action of the trial Court below in arbitrarily vacating a valid deed of bargain and sale for the conveyance of land by the respondents, Arthur R. Morrison and Marian A. Morrison, his wife, and a corporation, wholly controlled by them to the petitioner Devers, constitute a deprivation of property without due process of law in violation of the Fifth Amendment?

2. Did the action of the trial Court below in finding and declaring the existence of a parol trust in land in derogation of a valid deed held for same by petitioner, and declaring petitioner to be a trustee in lieu of being a valid grantee, constitute a deprivation of property in violation of the Fifth Amendment, where such determination by the Court is not supported by either sufficient evidence, nor is the same supported by valid precedent in law or equity?

3. Did the Court below deprive petitioner of his property in violation of the due process clause of the Fifth Amendment by failing and refusing to follow local State law and precedent, which decisively sustained all contentions of petitioner in the litigation below?

4. Did the Court below deprive petitioner of his property in violation of the due process clause of the Fifth Amendment by voiding a valid deed of bargain and sale, and declaring the existence of a parol trust in land in

lieu thereof, unsupported by any Federal precedent and only by arbitrary dictum alone, all in defiance of established local State law to the contrary.

5. Did the determinations and actions of the Court below derogate property rights in violation of the Fifth Amendment and reward and commend champertous conduct by resolving issues in controversy in favor of respondent, Capital Investors Co., whose participation in this litigation was obviously and admittedly champertous?

STATEMENT OF THE CASE

On June 29, 1962, respondents, Arthur R. Morrison and Marian A. Morrison, his wife, and Vadico Terminals Inc., a corporation wholly owned by said Morrisons, conveyed to petitioner, Malcolm B. Devers, three parcels of land of approximately 52,000 square feet, situated in the Rosslyn area of Arlington County. (Exhibit #15). The deed, in all respects one of bargain and sale and conveying said property in fee simple, was prepared by Bruce Lambert, Esq., attorney for the grantors. (Tr. 39).

Simultaneously with the execution of said deed, the petitioner executed Ten promissory notes payable to the order of Marian A. Morrison, totaling One Hundred and Eighty Thousand Dollars, $180,000.00, and a deed of trust on the subject property securing said notes. (Exs. #15 and #16). The petitioner also gave to the said Marian A. Morrison the sum of Ten Thousand Dollars ($10,000.00) in cash, receipted for by the said Marian A. Morrison. (Ex. #100). The deed and the deed of trust were recorded among the land records of Arlington County by said Bruce Lambert, Esq., with funds provided by the petitioner. (Tr. 36). The petitioner contends that on the same date, June 29, 1962, he executed a promissory note in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00), payable to Arthur R. Morrison. (Tr. 442)

In early December of 1962, respondent, Arthur R. Morrison, executed a separate instrument quitclaiming all of his residual rights in subject property, to the petitioner and also establishing a trust fund for the benefit of his children and designating the petitioner as one of the trustees. (Ex. #13, sometimes referred to as #12 in the transcript, and Tr. 119, 120 and 121).

Subsequently by deeds recorded among the land records of Arlington County, dated May 18, 1963, and June 25, 1963, the said respondent, Arthur R. Morrison, and respondent, Marian A. Morrison, and Vadico Terminals Inc., solely owned by respondents, Arthur R. Morrison and Marian A. Morrison, conveyed subject property to the respondent, Capital Investors Co., solely owned by one James T. Benn, its president. At all times the respondent, Capital Investors Co. and its president, James T. Benn, were fully aware of the fact that petitioner, Devers, held fee simple title to the property.

The respondent, Capital Investors Co., initiated litigation to quiet title to the subject property on the grounds that petitioner took title as trustee and not as grantee in fee. The pleadings are completely contradictory as to the beneficiaries of this alleged trust. (Arthur R. Morrison's Answer to the Complaint; Arthur R. Morrison's Answer to the Second Amended Complaint, Par. 13; Plaintiff's Amended Complaint, Par. 18 and Marian A. Morrison's Cross Claim Against Malcolm B. Devers, Par. 1).

The position of the petitioner Devers that the transaction was a valid sale of real property, is amply supported by documentary evidence as well as his testimony. (Tr. 431 through 464). Mr. Lambert, attorney for grantors, stated he prepared the deed in accordance with instructions from the grantors . (Tr. 39). He also stated that this transaction was part of the property settlement between Arthur R. Morrison and Marian A. Morrison, his wife, respondents herein. (Tr. 56). The petitioner's position is further strengthened by the statements of re-

spondent, Arthur R. Morrison, to the effect that he could get money from no other source to effect a property settlement with his wife, the respondent, Marian A. Morrison. (Tr. 405). The said Marian A. Morrison subsequently acknowledged that there was a complete property settlement to her satisfaction. (Tr. 613).

That after a trial, lasting five days, the trial Court below subsequently entered a judgment and decree vacating and holding for naught all deeds of conveyance in fee to petitioner, Devers, of the land involved herein. The trial Court further determined and adjudged petitioner Devers to be merely a trustee, holding the demised land in trust for respondents, Arthur R. Morrison and Marian A. Morrison, said trust coming into being and existence by the alleged creation of a parol trust. The trial Court further declared title quieted and vested in respondent, Capital Investors Co.

From this determination and judgment of the trial Court (App. B) petitioner Devers appealed to the United States Court of Appeals for the Fourth Circuit. A resulting consolidated appeal, following the consolidated trial below, was heard by the United States Court of Appeals for the Fourth Circuit on March 8, 1966, on May 2, 1966 (App. A), all issues raised by petitioner, Devers, herein, from the trial Court below were affirmed and resolved against his interests and claims.

Petitioner submits that he was denied fundamental rights and deprived of his property in violation of due process as guaranteed unto him by the Fifth Amendment of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I

Petitioner urges that the judgment of the United States Court of Appeals for the Fourth Circuit in its

opinion (App. A) compounded the erroneous determinations ordered and decreed by the judgment of the trial Court, as set forth in its decree of June 29, 1965 (App. B). The destruction of title in fee in the petitioner by the declaration of invalidity of the deeds of bargain and sale vesting title in him, and the further determination by the lower Court that petitioner was merely a trustee, pursuant to a parol trust as found by the lower Court, precluding his right to title in the premises in question as a valid grantee, has created a condition in this case which most surely reaches constitutional dimensions.

The petitioner urges that the finding of the existence of a parol trust in this cause was neither based upon adequate evidence apparent in the case, nor upon established legal precedent. On the contrary petitioner urges that such a determination by the lower court was contrary to the evidence and record of this case and was arbitrary and tantamount to pure dictum. The evidence in support of the validity of the solemn conveyances vesting title in fee in the petitioner to the land in question, is legion in the transcript and the record of this case.

A suit in equity to establish a parol trust on land in Virginia must follow the principles and guide lines established by the Supreme Court of Virginia in cases of a like nature.

There is no federal law respecting the establishment of trusts in lands in the various states. Accordingly, it is incumbent upon a federal court to follow precedents established by the courts of the state where the land is situated. Virginia is one of the few states which has not adopted Section 7 and 8 of the English Statute of Frauds. If that statute were the law in Virginia, the deed to the petitioner would have been conclusive and parol evidence would not be admissible to establish a parol trust.

However, though Virginia is unique in this respect, it has always proceeded with caution when required to rule upon evidence tending to set aside a written deed and establishing a parol trust. Thus, while the legislature may have been remiss in not protecting written instruments, the Courts have been vigilant and alert to the dangers inherent in permitting the creation of parol trusts. In one of the earliest cases heard by the Virginia Supreme Court, the Court there said, in *Springle* vs. *Hayworth*, 26 Grat 384, 67 Va. 384 (1875)

> "In the absence of fraud on the part of a legatee, a court of equity will not enforce a parol charge upon his legacy."

The Supreme Court of Virginia pointed out the dangers of relying upon oral evidence to impress a trust upon a conveyance or devise, and emphatically stated so on numerous occasions. See *Hook* v. *Hook*, 126 Va. 249, 101 SE 223, (1919) and *Ingles* v. *Grear*, 181 Va. 838, 27 SE 2d 222. Again the Supreme Court of Virginia stated in the case of *Shields* v. *E. S. Adkins & Co.*, 117 Va. 616, 85 SE 492, (1915),

> "While an express trust with respect to real estate or an interest therein may be created by parol and is enforceable in a court of equity, the application to the court for the enforcement of the trust must set forth a contract that is clear, definite and unequivocal in all its terms, since it is elementary that there can be no contract unless the minds of the parties have met and mutually agreed and specific performance will not be decreed where this requisite is lacking."

In the case at bar there is no clear definite and unequivocal evidence that can be pointed to as sufficient or adequate in law or fact to impress an express parol trust; nor does the record reveal any meeting of minds between petitioner and respondents to the end that petitioner's deed in

fee should be voided and in place thereof a parol trust should be impressed upon his title to land.

The Supreme Court of Virginia has made it clear that efforts to create a parol trust to be impressed upon land will not be honored unless all essential particulars are present in precise and unequivocal form. See *Creecy* v. *Grief*, 108 Va. 320, 61 SE 769. Also see *Powers* v. *Long*, 131 Va. 284, 108 SE 664 (1921), and *Taylor* v. *Delaney*, 118 Va. 203, 86 SE 831, and *Fleenor* v. *Hensley*, 121 Va. 367, 93 SE 582, and *Garrett* v. *Rutherford*, 108 Va. 478, 62 SE 389 (1908).

Petitioner submits that there is no evidence of contract between himself and respondents, Morrison, either oral or written, which is indicative of the creation of a trust or which could reasonably lead to the creation of a parol trust in this cause. The determination of the trial Court of the existence of a parol trust in this cause and affirmed by the appellate court subsequent thereto, establishes a new and unheard of precedent with respect to the solemnity of a deed of bargain and sale, as well as with respect to the creation of a trust. Petitioner submits that the judgments of the courts below endure in the face of precedents to the contrary. To permit these judgments of the lower courts to remain and endure as established law and precedent could be of danger to every holder of a fee simple deed in the State of Virginia.

II

The petitioner respectfully urges that federal courts should conform as near as possible, in absence of other considerations, to the precedents and law of the state applicable to a case in controversy concerning title to land such as in the case at bar. In the case of *Byrd* vs. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, this principle of conformity was decisively stated.

Petitioner urges further that the case of *Parkerson* v. *Chapman*, 179 F.2d 208 (4th Cir. 1950), cert. denied 399 U.S. 953 (1950) cited in the opinion of the appellate court (App. A) is hardly a precedent to sustain its opinion in the case at bar. Petitioner respectfully submits that the case of *Parkerson* vs. *Chapman*, supra, can hardly support the finding and determination of the lower court's decree (App. B) as set forth therein; and on the contrary, this case can hardly be urged as a serious precedent to support the judgment of the appellate court below. Petitioner urges that a serious consideration of the case of *Parkerson* v. *Chapman*, supra, should redound to his benefit, considering the record in this case and when applied to the facts and circumstances surrounding his claims to title in fee to the land in question, and should negate the existence of the parol trust impressed thereon.

The case of *Peal* v. *Luther*, 199 Va. 35, 97 SE 2d 668 (1957) referred to in the opinion of the appellate court, like the case of *Parkerson* v. *Chapman*, supra, is a case that dealt with a close family tie, and the purported parol agreements were proved without contradiction. Petitioner submits that nothing such as this obtains in the case at bar.

III

Petitioner urges that the lower court's decree (App. B) vesting title to the land in question in the respondent, Capital Investors Co., in substance and effect not only condones champertous conduct on the part of James T. Benn, president and sole owner of respondent, Capital Investors Co., but honors an invalid champertous agreement between said respondent, Capital Investors Co. and its president aforesaid, on one part, and the respondent, Marian A. Morrison, on the other part. Surely the law in its wisdom can neither applaud nor approve a champertous contract, such as obtained in the case at bar aforesaid.

The respondent, Capital Investors Co., by and through its sole owner and president, James T. Benn, admits champerty in the premises with impunity. In the case of *Pike* v. *Heurich*, 167 U.S. 624, 17 S. Ct. 927, 42 L. Ed. 302, this court held a champertous contract to be unlawful and that it passed no title in land to a party participant in and to such champertous contract.

The law of Virginia as announced by the Supreme Court of that State frowns upon champertous contracts involving real estate, and has declared them void. See *Roller* v. *Murray*, 107 Va. 527, 59 SE 421, and *Seward* v. *Camp Mfg. Co.*, 112 Va. 479, 71 SE 614.

CONCLUSION

For the foregoing reasons stated herein, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,218

CAPITAL INVESTORS CO., MARIAN A. MORRISON AND ARTHUR R. MORRISON, APPELLEES

v.

MALCOM B. DEVERS, APPELLANT

No. 10,220

CAPITAL INVESTORS CO., AND MARIAN A. MORRISON, APPELLEES

v.

ARTHUR R. MORRISON, APPELLANT

No. 10,221

CAPITAL INVESTORS CO., AND ARTHUR R. MORRISON, APPELLEES

v.

MARIAN A. MORRISON, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA
JOHN D. BUTZNER, JR., DISTRICT JUDGE

(Argued March 8, 1966. Decided May 2, 1966.)

Before BOREMAN and BELL, Circuit Judges, and CRAVEN, District Judge.

Wallace L. Schubert (John Dalonas on brief) for Malcolm B. Devers; Joseph B. Hyman (M. Patton Echols, Jr., on brief) for Arthur R. Morrison; James C. McKay (Ralph J. Luttrell, R. Harrison Pledger, Jr., James van R. Springer, and Covington & Burling on brief) for Marian A. Morrison; and Keith L. Seegmiller for Capital Investors Co.

CRAVEN, District Judge:

These are three appeals from a final decision of the district court quieting title to certain real estate known as the "Rosslyn Property" in Capital Investors Company (hereinafter called Capital). The Rosslyn property is located in Arlington County, Virginia, and its value is considerable—perhaps as much as $1,000,000.00.

The parties are as follows:

Arthur Morrison and his now divorced wife, Marion Morrison. Prior to 1962 they were sole

owners of the Rosslyn property subject only to two deeds of trust (securing an indebtedness of $95,000.00), the validity of which is not in controversy;

Malcolm B. Devers, a long-time friend and sometimes business associate of Arthur Morrison. The first of several conveyances of the Rosslyn property, with which we are concerned, was made to Devers on June 29, 1962. This conveyance was held by the district court to be in trust and not in fee simple as Devers contends;

Charles Fairchild, a real estate broker, to whom Mr. Morrison attempted to execute a 99 year lease of the Rosslyn property in March 1963. The lease was held to be null and void by the district court. Fairchild has abandoned his appeal;

James T. Benn, sole owner of Capital—a shell corporation with no assets whatever except the leasehold interest in the Rosslyn property, the validity of which is the central issue in these appeals.

This litigation arose out of the disruption of the marriage between Marian and Arthur Morrison. Prompted by dissolution of their marriage, the Morrisons commenced a series of transactions in June 1962 with respect to the Rosslyn property. They were then joint owners of the property, either directly or through their wholly owned corporations,[1] subject to the previously mentioned two deeds of trust. For many years Mr. Morrison had been engaged in real estate speculation, and was apparently successful in many of his ventures. The Rosslyn property and a tract of land in Brevard County, Florida, represented the principal fruits of his enterprise. In working out the details of a marriage settlement, Mrs. Morrison gave up any claim to the Florida land, and the settlement was built around the Rosslyn property.

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[1] Marco, Morrison & Company and Yadico Terminals.

On June 29, 1962, the Morrisons conveyed record title in the property to Malcolm B. Devers, pursuant to an agreement executed on June 6, 1962. Mrs. Morrison received $180,000.00 in notes secured by a deed of trust on the Rosslyn property. She also received $10,000.00 in cash. The agreement contained a provision allowing Mrs. Morrison to take back all the property in the event of default in payments by Devers on her notes, or upon Dever's failure to keep up payments on the notes secured by the two recorded and valid deeds of trust amounting to $95,000.00. This was to be accomplished by Mrs. Morrison's filing an affidavit of default in the Arlington County land records. Such an affidavit was filed, but the district court held it ineffective and null and void.

Sometime during the latter part of 1962 or early 1963, Mr. Devers was asserting unconditional ownership of the Rosslyn property. Its value had by this time appreciated sharply due to changes in zoning. Ignoring record title in Devers, and fearful that Devers was about to dispose of the property in some way, Mr. Morrison, in March 1963, executed a 99 year lease of the property to Mr. Fairchild. The district court held the property lease was intended only to prevent conveyance by Devers and that it was invalid. Shortly thereafter, Mr. Morrison was introduced to James T. Benn (sole owner of Capital), which led to yet another conveyance of the Rosslyn property—this time from Mr. Morrison to Capital on May 18, 1963. Again, this conveyance ignored record title in Devers and also ignored Mrs. Morrison's interest (in the event Devers' title proved invalid), and the lease to Fairchild. Under this agreement, Mr. Morrison received from Capital two promissory notes, one for $100,000.00 and one for $1,000,000.00. Both were interest bearing notes. Within a week, however, these notes were cancelled and others of smaller denomination issued which did not call for the payment of interest.

Morrison and Capital, reflecting on this conveyance, decided, apparently, that they must get Mrs. Morrison to join in the conveyance. She was brought into the picture and affirmed Mr. Morrison's conduct in ignoring: (a) the Devers conveyance, (b) the purported default by Devers and vesting of title in Mrs. Morrison, and (c) the lease to Fairchild. Together they then ignored Mr. Morrison's purported conveyance to Capital and joined in new conveyances of the Rosslyn property to Capital. The new conveyances, and the contract of sale dated July 29, 1963, contemplated that Capital would pay $500,000.00 to each of the Morrisons for their respective interests in the Rosslyn property. Capital gave each of the Morrisons promissory notes as evidence of its indebtedness. The district court held the conveyance of the Rosslyn property valid, but required Capital to execute a deed of trust on the property to secure its $1,000,000.00 obligation. One question on this appeal is whether the notes given by Capital under this latest contract of sale were interest bearing. The district court held that they were not.

In summary, the district court decreed as follows:

(1) That under the deed of the Rosslyn property on June 29, 1962, Devers became trustee of the legal title for the benefit of the Morrisons;

(2) That the promissory notes given by Devers to Mrs. Morrison dated June 29, 1962, in the amount of $180,000.00 were invalid;

(3) That the affidavit of default executed and recorded by Mrs. Morrison in the Arlington County land records on July 23, 1963, was void and of no effect;

(4) That the Fairchild lease dated March 10, 1963, was invalid;

(5) That the conveyance of May 18, 1963, of the Rosslyn property by Mr. Morrison to Capital was invalid;

(6) That the deeds of Mr. and Mrs. Morrison dated July 29, 1963, and July 25, 1963, respectively, conveying the Rosslyn property to Capital were valid and binding;

(7) That the notes issued by Capital to the Morrisons under the contract of sale of July 29, 1963, were not interest bearing;

(8) That title to the Rosslyn property be quieted and vested in Capital.

The decision of the district court that Devers held the Rosslyn property as trustee by reason of the conveyance to him on July 29, 1962, and not as fee simple owner is not clearly erroneous and will not be disturbed. Although the deed to Devers was absolute on its face, there is extensive evidence in the record from which the district court could conclude that a trust had been created. *Pearl* v. *Luther*, 199 Va. 35, 97 S.E.2d 668 (1957); see *Parkerson* v. *Chapman*, 179 F.2d 208 (4th Cir. 1950), cert. denied 339 U.S. 953 (1950). The district court correctly decided that the trust was terminated by the Morrisons in 1963 when they conveyed the property to Capital. As beneficiaries and settlors of the trust, the Morrisons, by acting in concert, could terminate the trust at any time. To do so, it was only necessary that they act as they did—in such a manner as to unequivocally indicate that Devers' trusteeship was ended. *Rowley* v. *American Trust Co.*, 144 Va. 375, 132 S.E. 347 (1926).

Since Devers got only naked legal title as trustee, the Devers notes in the amount of $180,000.00 were unsupported by consideration, and the district court correctly voided them.

The decision of the court voiding the affidavit executed and recorded on July 23, 1963, by Mrs. Morrison, whereby

she sought to acquire fee simple title to all the Rosslyn property by foreclosure proceedings, is not clearly erroneous. The Morrisons were beneficiaries under a trust. Mrs. Morrison could not by summary foreclosure act in derogation of Mr. Morrison's beneficial interest in the property. Moreover, her subsequent conduct in joining with Mr. Morrison in a conveyance to Capital recognized the ineffectiveness of her abortive foreclosure.

The district court's decision that the Fairchild lease of March 5, 1963, was invalid is not clearly erroneous. There is extensive evidence in the record to show that the lease was made in violation of Virginia law and was fictitious, i.e., drawn and executed only because of Mr. Morrison's fear that Mr. Devers was attempting to dispose of the Rosslyn property and to hinder Devers. The district court's decision that it was not intended by the parties to be a valid lease is supported by substantial evidence.

The May 18, 1963, unilaterial conveyance by Mr. Morrison of the Rosslyn property to Capital was held by the district court to be null and void. Its decision is obviously correct, as Mr. Morrison could not convey more than he owned.

The deeds to the Rosslyn property given to Capital at separate times by both Mr. and Mrs. Morrison were held valid. That the deeds were not procured by fraud is supported by the evidence, and the decision of the court is not clearly erroneous.

It follows, of course, that the notes issued by Capital to the Morrisons are valid obligations. It was proper, in the exercise of its equitable jurisdiction, and considering that Capital was an empty corporate shell, for the district court to require Capital to execute a deed of trust to secure the obligation. In return, the district court properly quieted title in Capital.

We affirm the decision of the district court in all respects with the exception of what follows:

By letter dated March 16, 1965, the district court refused to allow the Morrisons interest on the notes given them by Capital under the contract of sale of July 29, 1963.

Mrs. Morrison agreed to convey to Capital her interest in the Rosslyn property, and Capital agreed to pay $500,000.00 to her. The contract of sale begins with more than four pages of recitals setting forth the various transactions involving the Rosslyn property which had taken place since June of 1962. The eleventh paragraph states that "CAPITAL INVESTORS CO. does hereby agree to make, execute and deliver to MARIAN A. MORRISON twenty-five promissory judgment notes, each in the amount of $20,000 aggregating the sum of $500,000, *upon the same terms and provisions as the notes* delivered and received by ARTHUR R. MORRISON on May 18, 1963, and reissued on May 25, 1963, from CAPITAL INVESTORS CO." (Emphasis Added)

The Notes issued to Arthur Morrison on May 18, 1963, provided for interest at the rate of six percent per annum. The reissued notes, dated May 25, 1963, were silent with regard to interest. Therefore, the contract of sale of July 29, 1963, is ambiguous, since it refers to both groups of notes—one of which bore interest, and one of which did not.

In cases such as this, where an agreement is vague, ambiguous, or indefinite, parol evidence is admissible to establish the real contract. *Utica Mutual Ins. Co.* v. *Rollason*, 246 F.2d 105 (4th Cir. 1957); see also *Shockey* v. *Westcott*, 189 Va. 381, 53 S.E.2d 17 (1949). There is in the record of this case testimony by Mrs. Morrison that Benn (acting for Capital) had "indicated a number of times that he would pay interest on these notes."

There is also testimony by Mr. Morrison that although his reissued notes dated May 25, 1963, bore no interest, they were improperly drawn and were to be redrawn to include interest. We do not understand that the district court rejected this testimony as lacking in credibility.

Under the July 29th agreement, Capital was entitled to possession of the property. We think it manifestly unjust that it should have the right of possession, carrying with it the right to rents, and at the same time retain and use for its own benefit the purchase money without paying interest on it. *Cohen* v. *Jenkins*, 125 Va. 635, 100 S.E. 678 (1919); *Parker* v. *Murphy*, 152 Va. 173, 146 S.E. 254 (1929). It is true that Devers has remained in possession of the property pending this litigation, but Capital has filed a claim against him for all rents collected. This claim will be heard in the forthcoming accounting proceeding in the district court. If Capital retroactively gains the benefits of possession, we think it must either account for the rents or pay interest on the purchase money for the same period. In any event, Capital will be held either to account for rents or pay interest for the forthcoming period during which it has the right of possession.

The decision of the district court that no interest is allowable on the notes is vacated. On remand, the district court wil determine, in the exercise of its equitable jurisdiction, whether to allow the Morrisons rents or interest on the purchase money.

Affirmed in part, reversed in part, and remanded.

APPENDIX B

Decree Appealed from Dated June 29, 1965
(Less Property Description)

Filed June 29, 1965
Clerk, U. S. District Court, Alexandria, Virginia

Decree of the District Court, Dated June 29, 1965

United States District Court For
The Eastern District of Virginia
Alexandria, Virginia

Civil Action No. 2968

CAPITAL INVESTORS CO., PLAINTIFF

v.

ARTHUR R. MORRISON, ET ALS, DEFENDANTS

DECREE

This cause came on for trial and was tried before the court without a jury beginning on September 2, and

ending on September 11, 1964, and the Court having made its Findings of Fact and Conclusions of Law, it is this 29th day of June 1965,

ORDERED and DECREED as follows:

1. That the land which is the subject matter of this suit consists of two adjoining parcels, hereinafter referred to as "Rosslyn Properties," and is located in Rosslyn, Arlington County, Virginia, and more particularly described as follows:

BEGINNING for the said portion at a point * * *

2. That two certain Deeds of Trust, one on each of the two tracts of the said Rosslyn Properties, and recorded respectively in Deed Book 809, page 307 and Deed Book 1057, page 147 of the land records of Arlington County, Virginia, are in no way affected by this litigation and each continues in such force and effect as it may have without regard to this decree.

3. That a certain deed of said Rosslyn Properties from Vadico Terminals, Inc., and M. A. Morrison and A. R. Morrison to Malcolm B. Devers, dated June 29, 1962 and recorded in Deed Book 1481, page 24 of the land records of Arlington County, Virginia, conveyed title to the said Devers in trust for the benefit of Arthur R. Morrison and Marian A. Morrison. Arthur R. Morrison and Marian A. Morrison were the beneficial owners of the said properties after said conveyance of legal title to said Devers and as such beneficial owners they were entitled to have title reconveyed to them at any time.

4. That a certain purported lease of the Rosslyn Properties from Arthur R. Morrison to Charles M. Fairchild dated the 10th day of March, 1963 and recorded in Deed Book 1503 page 150 and corrected in Deed Book 1512 page 66, of the land records of Arlington County, Virginia is hereby vacated, set aside and declared to be of no force or effect whatever.

5. That those certain promissory notes in the aggregate amount of $180,000.00 given by Malcolm B. Devers to Marian A. Morrison and dated June 29, 1962 are hereby vacated, set aside and declared to be of no force or effect whatever and the said Marian A. Morrison is hereby directed forthwith to deposit all of said notes with the Clerk of this Court for cancellation or other dispositions thereof as may be finally determined in the course of an accounting yet to be had in this case.

6. That certain affidavit executed by Marian A. Morrison on July 23, 1963 and recorded in Deed Book 1517, page 58, of the land records of Arlington County, Virginia, is hereby vacated, set aside and declared to have no force or effect whatever as a conveyance of any interest in the Rosslyn Properties or as affecting the ownership ~~of~~ or title to said properties.

7. That a certain deed of the said Rosslyn Properties from Arthur R. Morrison to Capital Investors Company dated July 29, 1963 and recorded in Deed Book 1575 page 606 of the land records of Arlington County, Virginia is hereby declared to be valid and binding and effective according to the tenor thereof.

8. That a certain deed of the said Rosslyn Properties from Marian A. Morrison to Capital Investors Company dated July 25, 1963 and recorded in Deed Book 1518 page 679 of the land records of Arlington County, Virginia is hereby declared to be valid and binding and effective according to the tenor thereof.

9. That the assignment dated the 18th day of May, 1963 from Arthur R. Morrison to Capital Investors Company, and of record in Deed Book 1509 page 502 of the land records of Arlington County, Virginia and recorded in Deed Book 1512 page 66 of said land records; the affidavit of Arthur R. Morrison dated June 10, 1963, and of record in Deed Book 1512 page 68 of the land

records of Arlington County, Virginia; the statement of Arthur R. Morrison dated May 15, 1963, and of record in Deed Book 1512 page 69 of the land records of Arlington County, Virginia; the Deed of Trust dated June 29, 1962 by Malcolm B. Devers to Bruce E. Lambert and Lucille Lambert, Trustees, and recorded in Deed Book 1481 page 27, of the land records of Arlington County, Virginia, the memorandum lis pendens dated March 5, 1963, and recorded in Deed Book 1502 page 542 of the land records of Arlington County, Virginia, and the memorandum lis pendens dated March 5, 1963 and recorded in Deed Book 1502 page 545, all are hereby vacated and set aside as having no effect against the title to the said Rosslyn Properties.

10. That a certain second Deed of Trust on said Rosslyn Properties from Capital Investors ~~Company~~ to Ralph J. Luttrell and M. Patton Echols, Jr., Trustees, dated June 4, 1965, given to secure payment of certain promissory notes of Capital Investors ~~Company~~ to Marian A. Morrison in the amount of $500,000.00 and to Arthur R. Morrison in the amount of $500,000.00, ~~and recorded in Deed Book page of the land records of Arlington County, Virginia~~, is hereby declared to be valid and binding and effective according to the tenor thereof; that the motions of Marian A. Morrison and Arthur R. Morrison that interest on said notes be allowed and that all of the stock of plaintiff be deposited with the Clerk of this Court, are denied and that the plaintiff is hereby required to provide mortgage title insurance insuring Arthur R. Morrison and Marian A. Morrison against any loss by reason of defect or deficiency of any kind in the title to the Rosslyn Properties upon which the said Deed of Trust referred to in this paragraph rests.

11. Marian A. Morrison is hereby directed to deliver to the Clerk of this Court one of the promissory notes

in the amount of $20,000.00, to be secured as provided in paragraph 10, above, the same to be held by the Clerk until further order of the Court, against claims that may be established against Marian A. Morrison in the accounting to be made later in this case. And Capital Investors Co., is hereby directed, until further order of this Court, not to make any payments to anyone on account of its indebtedness to Arthur R. Morrison by reason of the notes referred to in paragraph 10 hereof and any amount that may become due and payable will be held as security for any claims established against Arthur R. Morrison in the accounting to be had in this case.

12 That title to said Rosslyn Properties is hereby quieted, and declared to be vested in Capital Investors ~~Company~~ subject to those certain deeds of trust confirmed and declared to be valid and binding in paragraphs 2 and 10 of this decree.

13. That Capital Investors ~~Company~~ is entitled to and hereby is granted immediate possession of all of said Rosslyn Properties, provided that the rights of tenants, if any, now in occupancy of any part thereof and who are not parties to this suit are not affected by this decree.

14. The names of the persons and parties whose interests are or may be affected by this decree are: Malcolm B. Devers, Arthur R. Morrison, Marian A. Morrison, Charles M. Fairchild, Stellum International Corporation, Bruce E. Lambert and Lucille Lambert, Trustees, and Capital Investors ~~Company~~, and the plaintiff is hereby ordered, at its own expense, to have this decree recorded among the land records of Arlington County, Virginia to have marked upon the margin of all deed book references contained in this decree, notice of this decree and that such instruments have been set aside, confirmed or otherwise affected by the terms of this decree.

15. That the Court hereby finds and declares that Multiple Claims are presented in this case within the meaning of Rule 54 (b) of the Federal Rules of Civil Procedure, that there is no just reason for delay with respect to the claims hereby adjudicated and entry of final judgment upon the claims hereby adjudicated, within the meaning of said Rule 54 (b), is hereby directed.

/s/ John D. Butzner Jr.
Judge

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No. 509

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MALCOLM B. DEVERS,
Petitioner

vs.

CAPITAL INVESTORS CO., MARIAN A. MORRISON,
ARTHUR R. MORRISON
Respondents

BRIEF OF CAPITAL INVESTORS CO., IN OPPOSITION TO CERTIORARI

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BRIEF OF CAPITAL INVESTORS CO., IN OPPOSITION TO CERTIORARI

The petition for a writ of certiorari in this case should be denied because no question is presented which is appropriate for review by this Court.

1. The facts appear in the petitioner's statement of the case and are not in dispute. They are more succinctly and briefly stated as follows: On June 29, 1962, Arthur R. Morrison and Marian A. Morrison executed and delivered to petitioner a deed purporting to convey to him in fee simple the land involved in this case. This respondent, Capital Investors Co., as assignor of Mr. & Mrs.

Morrison, claimed that the deed, although fee simple in form, was in fact delivered pursuant to an oral agreement that petitioner would hold the title in trust for the grantors. Denial of the oral trust by petitioner presented the only issue between these parties in the district court and, upon evidence presented, that issue was resolved by the trial judge, without a jury, in favor of the oral trust. The Circuit Court of Appeals, finding "extensive" evidence in the record to support this finding of the trial court, affirmed. (Pet. App. p. 6A). The finding was not clearly erroneous. (Rule 52(a), Federal Rules of Civil Procedure).

2. It is submitted that no question is presented by this case of the character mentioned by Rule 19 of this Court.

Indeed, no specific question of law is presented by the petition at all. Petitioner forthrightly concedes in this Court that oral trusts are recognized by the law of Virginia (Pet. App. p. 6-7), contrary to the assertion in question 3 that the courts below refused to follow State law. The only question of law arising on the record is whether the findings of the district court adverse to petitioner are clearly erroneous. This question is not stated in the petition, and in any event, it is not one appropriate for review by this Court. The concurrence of both courts below regarding issues of fact may properly be regarded as conclusive in this Court. *Anderson* v. *Abbott* 312 U.S. 349, 356.

The petition states questions not raised or decided in either of the courts below. This appears clearly enough from the opinions below set forth in the appendix to the petition. There is no reference in either to a claim of deprivation of property without due process, which is at

the heart of each of the questions stated in the petition. cf. *McCullough* v. *Kammerer Corporation* 323 U.S. 327.

Respectfully submitted

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